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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 544

HARRY BERGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The trial court's charge to the jury appears at R. 656–695. The opinion of the Circuit Court of Appeals (R. 752–755) has not yet been reported.

JURISDICTION

The judgment sought to be reviewed was entered November 13, 1934 (R. 756). The petition for a writ of certiorari was filed in this Court November 26, 1934. The jurisdiciton of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The following questions are presented by the petition for writ of certiorari and supporting brief:

1. Whether there was a material variance between the indictment and the proof.

2. Whether corroboration was required of the testimony as a codefendant used as a Government witness.

3. Whether the conduct of the District Attorney constituted prejudicial error.

Unless the Court should be of the opinion that the bill of exceptions was signed and filed in time, a question which, we believe, is open to serious doubt, the questions stated above are not properly before this Court for consideration.

STATEMENT

The petitioner and two codefendants were convicted in the District Court of the United States for the Eastern District of New York under a count of an indictment charging a conspiracy to possess and pass counterfeit twenty and one hundred dollar bills (R. 27–32, 696). The prisoner was sentenced to imprisonment for a period of one year and one day (R. 698). The petitioner alone appealed to the Circuit Court of Appeals (R. 704, 706). That court affirmed the judgment of conviction (R. 752–756).

ARGUMENT

I

It is obvious from the statement of the questions presented by the petition for writ of certiorari and supporting brief that they involve the consideration of testimony introduced at the trial and of other matters occurring thereat which may, of course, properly be incorporated in the record only by bill of exceptions. *Suydam* v. *Williamson,* 20 How. 427, 432–433; *Bank* v. *Kennedy,* 17 Wall. 19; *Jones* v. *Buckell,* 104 U. S. 554.

The record in the instant case discloses that sentence was passed upon the petitioner in the District Court for the Eastern District of New York either on March 27 (R. 698) or March 28 (R. 41), 1934. The term of the District Court at which this judgment was entered would have expired by statute on April 4, 1934 (Section 97, Judicial Code, as amended; Appendix, *infra*), but it is provided by Rule 5 of the District Court for the Eastern District of New York (Appendix, *infra*) that "For the purpose of taking any action which must be taken within the Term of the Court at which final judgment or decree is entered, each Term of Court is extended for ninety days from the date of entry of the final judgment or decree." The term was, therefore, extended to June 26, 1934, for the purpose of signing and filing the bill of exceptions. The order settling the bill of exceptions and direct-

ing that it be filed was not, however, signed by the District Judge until August 23, 1934 (R. 703).

There are in the record no orders purporting expressly to extend the time for the preparation, signing, or filing of the bill of exceptions beyond the expiration of the term on June 26, 1934, and the United States Attorney for the Eastern District of New York advises that there were no orders in this case "other than those in the record." (See telegram copied in Appendix, *infra.*) There appear, however, in the record several orders entered pursuant to affidavits of counsel for the petitioner and upon stipulations with the United States Attorney, extending until August 25, 1934, the time within which to docket the case and file the record in the Circuit Court of Appeals (R. 722, 728, 734, 740). The stipulations of the United States Attorney were no broader than the orders (R. 727, 733, 739, 747). It is clear that, ordinarily at least, an order extending the time for docketing a case and filing the record in the Circuit Court of Appeals does not extend the time for signing and filing the bill of exceptions, and *vice versa,* the reason being, of course, that the two types of orders relate to different matters of procedure. *Reliable Incubator & Brooder Co.* v. *Stahl,* 102 Fed. 590, 593–594 (C. C. A. 7th); Longsdorf's Cyclopedia of Federal Procedure, Sec. 2822, Vol. 6, p. 286. See also *Old Nick Williams Co.* v. *United States,* 215 U. S. 541; *Imperial Beverage Corporation* v. *Charles E. Hires Co.,* 55 F. (2d) 405, 406 (E. D. N. Y.). Even

though a bill of exceptions is signed and filed in time, the case may be dismissed upon motion of the appellee if the record on appeal is not docketed in the appellate court on or before the return day of the citation, unless the time has been enlarged by order of court (Rule 11 of this Court; Rule 14 of the Circuit Court of Appeals for the Second Circuit). The bill of exceptions would, therefore, appear to have been signed and filed out of time, unless there are circumstances which take the case out of the general rule. (*Exporters* v. *Butterworth-Judson Co.*, 258 U. S. 365, 368; Cf. *Taylor* v. *United States*, 286 U. S. 1, 4–5.) So far as the record discloses, there appear to be no such circumstances.

Cudahy Packing Co. v. *City of Omaha*, 24 F. (2d) 3 (C. C. A. 8th), certiorari denied, 278 U. S. 601, does not seem to be in point. In that case the court recognized the general rule that an order extending the time for filing a transcript of record in the appellate court does not enlarge the time for filing a bill of exceptions, but held that it would be inequitable to apply this rule because the request for an extension was made at the instance of counsel for the defendants in error in order to enable them to examine a voluminous record, and because the District Judge, although intending to grant such an extension, made his order apply by inadvertence only to the filing of the transcript of record in the Circuit Court of Appeals. In the instant case the extensions of time for docketing

the case and filing the record in the Circuit Court of Appeals appear to have been requested merely for the accommodation of counsel for the petitioner (R. 724–726, 730–732, 736–738, 742–746), and the telegram of the United States Attorney (Appendix, *infra*) indicates that the orders were requested in this form because it was assumed that they included the filing of the bill of exceptions, rather than that the orders were the result of inadvertence.

The consent given by the United States Attorney at the time the bill of exceptions was signed to the settling and filing thereof (R. 702) does not affect the situation, for it is well settled that the consent must be given during the term. *Waldron* v. *Waldron,* 156 U. S. 361; *Exporters* v. *Butterworth-Judson Co., supra,* p. 369; *Gardner* v. *United States Fidelity & Guaranty Co.,* 60 F. (2d) 437, 439–440 (C. C. A. 10th).

Neither would it appear that the consents given by the United States Attorney to the entry of the various orders extending the time for docketing the case and filing the record in the Circuit Court of Appeals are of any effect, for, after providing that in a criminal case an application for an extension of time to prepare a bill of exceptions must be presented to the District Judge, Rule 5 of the District Court specifically directs that "The Judge shall consider the application and in his discretion grant or deny the same, *notwithstanding the consent of the United States Attorney.*" (Italics ours.)

II

The petitioner contends that while the indictment charged one conspiracy, the proof established two, and that there was, therefore, a fatal variance.

The Circuit Court of Appeals took the same view as to the evidence, but held, with much logic, that such a variance is not fatal, although it conceded that a contrary view is entertained by other Circuit Courts of Appeals (R. 752–755).

The view that there was a variance seems to be predicated principally upon the proposition that the arrangement between the two original conspirators was that the counterfeit bills were to be passed off to people advertising jewelry for sale, whereas the evidence does not disclose any such limitation upon the manner of disposing of the bills when one of these conspirators enlisted the services of the petitioner and another conspirator in passing off the bills.

Despite the view of the court below as to the scope of the evidence, we think that the proof may fairly be regarded as establishing but one conspiracy. The indictment charged a conspiracy to utter and pass generally counterfeit bills of certain specified denominations, but did not set forth the manner in which the bills should be passed (R. 27–29). It is true that at the start the evidence shows that the counterfeit bills were to be passed to persons advertising jewelry for sale, but the evidence also shows that as the conspiracy progressed other

methods of disposing of the bills were adopted; i. e., the passing of them to shopkeepers and others. These new methods were not the result of a separate conspiracy but merely the expansion of the original conspiracy, the object of which concerned itself dominantly with exchanging the bills for things of value. There could have been as many methods adopted as there were conspirators, and as long as any or all the methods contributed to the single objective of the conspiracy, all were bound, and each different method did not create a new and separate conspiracy. It was not necessary in order to incur guilt that the petitioner should know all the methods adopted by his coconspirators. See *Zottarelli* v. *United States,* 20 F. (2d) 795 (C. C. A. 6th), certiorari denied, 275 U. S. 571; *Hitchman Coal and Coke Co.* v. *Mitchell,* 245 U. S. 229, 249; *Frohwerk* v. *United States,* 249 U. S. 204, 209; *Pierce* v. *United States,* 252 U. S. 239, 244; *Wilson* v. *United States,* 232 U. S. 563, 567; *Coates* v. *United States,* 59 F. (2d) 173, 174 (C. C. A. 9th). We submit, therefore, that the conspiracy charged in the indictment did not cease to be single because of a change in the means of accomplishing its object. Under this view the cases relied upon by petitioner to establish a conflict of decisions do not require consideration.

The Circuit Court of Appeals lays some emphasis upon the fact that all of the conspirators did not know each other. This, of course, was not

necessary. *Coates* v. *United States, supra; Mendelson* v. *United States,* 58 F. (2d) 532 (App. D. C.); *Booth* v. *United States,* 57 F. (2d) 192 (C. C. A 10th). The circumstances attending the enlisting of the petitioner's aid in disposing of the counterfeit money were, we believe, sufficient to warrant the jury in finding that he knowingly entered the conspiracy (R. 158–160, 243–244.)

III

Petitioner contends that because Katz, the Government's chief witness, was a confessed criminal, corroboration of his testimony "became important." It is no longer necessary to corroborate such a witness. The jury is entitled to determine for itself the credibility to be attached to his testimony. *Caminetti* v. *United States,* 242 U. S. 470, 495. But we think the record establishes adequate corroboration, as pointed out by the court below (R. 752–753). The testimony of Katz here complained of agrees in many particulars with that of other Government witnesses and also with petitioner's own testimony. Furthermore, the trial court carefully cautioned the jury with respect to its duty in weighing the testimony of Katz (R. 672–673).

It must also be borne in mind that in weighing the Government's evidence the jury was confronted with the fact that petitioner had served a term for robbery and had also sworn falsely to applications

for a real-estate broker license and a permit to carry a pistol (R. 325, 371–372, 373, 374, 376–377).

IV

The final contention of petitioner addresses itself to alleged misconduct on the part of the District Attorney in examining witnesses and in his remarks to the jury. When the instances upon which petitioner relies are considered in their record setting, and not in isolation, coupled with the admonitions given by the trial court from time to time, and the following final instruction to the jury, we think it clear that no possible prejudice is shown to have occurred (R. 669, 693):

> Let us start out with this proposition, that whatever counsel may have said to you was the evidence given by any witness, whatever I may say to you was the evidence given by any witness, is simply our recollection. That does not control you. It is your recollection of the evidence which has been given which is controlling. If there be any doubt in your mind as to the evidence of any witness on any point, you may have that read to you by the stenographer, if you shall require it.
>
> Gentlemen, before we go into a further discussion there was in the summation yesterday a little dispute between some of the counsel as to their personal relations. Let me say to you that has no place in this trial. Counsel are not on trial, and whether they like each other or dislike each other is a mat-

> ter of absolutely no importance. We are not here determining any differences that they may have between each other. The people on trial here are the three defendants, and you will decide the case on the evidence that has been given here, not on any differences that there may be between counsel.
>
> * * * * * * *
>
> Gentlemen, without any sympathy, without any prejudice, without any bias, decide this case, * * *.
>
> Take the case and decide it as your oath requires you to do upon the evidence, upon the instructions of the Court, drawing from the evidence reasonable inferences which you have a right to draw, but determining the case on the evidence, not on speculation.

Four judges below found no prejudice ensued from the activities of the District Attorney here complained of, and it would require something more than general faultfinding to establish the contrary. *Harris* v. *United States,* 71 F. (2d) 532 (App. D. C.), certiorari denied, October 8, 1934, under No. 209; *Caminetti and Diggs* v. *United States,* 220 Fed. 545, 555–557, affirmed, 242 U. S. 470; *Horowitz* v. *United States,* 262 Fed. 48, 51 (C. C. A. 2d), certiorari denied, 252 U. S. 586; *Silkworth* v. *United States,* 10 F. (2d) 711, 721 (C. C. A. 2d), certiorari denied, 271 U. S. 664; *Dunlop* v. *United States,* 165 U. S. 486, 498.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for writ of certiorari should be denied.

J. CRAWFORD BIGGS,
Solicitor General.
JOSEPH B. KEENAN,
Assistant Attorney General.
HARRY S. RIDGELY,
W. MARVIN SMITH,
Attorneys.

DECEMBER 1934.

APPENDIX

Section 97, Judicial Code, as amended (U. S. C., Title 28, Sec. 178):

> Terms of the district court for said district [Eastern District of New York] shall be held at Brooklyn on the first Wednesday in every month.

Rules of the District Court for the Eastern District of New York:

> RULE 5. *Extension of terms.*
>
> For the purpose of taking any action which must be taken within the Term of the Court at which final judgment or decree is entered, each Term of Court is extended for ninety days from the date of entry of the final judgment or decree.
>
> All applications for the extension of time to prepare bills of exception or assignments of error in criminal cases, or to prepare and certify records on appeal in criminal cases or in naturalization or habeas corpus proceedings, shall be presented to the Judge who tried the case or heard the proceedings, unless he is no longer in office or he be absent from the District, and in such case to the Judge holding the Criminal Term; and shall be accompanied by an affidavit showing due reason for such extension, the date of the final judgment or decree, and in criminal cases whether the defendant is in custody or on bail. The Judge shall consider the application and in his discretion grant or deny the same, notwithstanding the consent of the United States Attorney.

RULE 26. *Preparation and certification of records on appeal.*

(1) In any cause or proceeding wherein the final judgment or decree is sought to be heard upon appeal, the appellant shall serve on the opposing parties, not later than ten days after filing notice, or after allowance of the appeal, unless the time be extended by the Court, a typewritten or printed copy of his proposed apostles, record, or bill of exceptions, which shall include a statement of the material proceedings in the action, a list of the material proceedings in the action, a list of the material papers on record with the Clerk, the charge or opinion, if any, and the testimony proposed by him, together with a copy of the exhibits, or a list of such exhibits as can be identified by number or description. Within ten days thereafter the opposing party shall serve upon the appellant his proposed changes, additions, or amendments, numbered and with references to the record or stenographer's minutes. The appellant shall within four days accept such as he considers proper, and shall cause to be submitted to the Judge by whom the case was heard (or any judge who may legally act in his place) the proposed apostles, record, or bill of exceptions, and the proposed changes, additions, or amendments, with his acceptances and nonacceptances and with a reference to the record or stenographer's minutes as to such disallowances. The appellant shall give two days' notice of such submission, and either party may present a memorandum upon the points of difference. Before the expiration of the term, *ex parte* orders may be signed by any judge of the Court extending the term from time to time until after the record or bill of ex-

ceptions has been filed, but no record or bill of exceptions will be settled or filed after the term as extended by Rule 5 or by special order has expired. The appellant shall cause the proposed record or bill of exceptions when settled by the Court to be filed within the time limited and within the term as extended and so as to comply with the provisions of sections 997, 1000, and 1007 of the Revised Statutes as to the giving of security and as to the perfecting an appeal. The appellant shall then cause to be printed as many copies of such record on appeal as may be required by the rules of the Circuit Court of Appeals. All such printed books shall comply with Rule 31 of the Supreme Court of the United States and shall be upon pages eleven inches long by seven inches wide, with the printed portion seven inches long by four inches wide. One of such copies may, by order of the Court, with or without stipulation of the parties, be filed with the Clerk *nunc pro tunc* for use in lieu of the papers previously settled, and another copy of this record so filed shall be certified by the Clerk of the Court under seal thereof.

Telegram of December 15, 1934, to Solicitor General from United States Attorney for the Eastern District of New York:

> Your letter thirteenth Berger number five forty four no orders other than those in record apparently assumed order extending time to file record includes filing bill of exceptions.

U. S. GOVERNMENT PRINTING OFFICE: 1936